FILED
NOV 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

C. ELVIN FELTNER, JR., *et al.*,
Petitioners.

v.

HARRY E. FLEISCHHAUER, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RICHARD BOYDSTON,
Counsel of Record
SHAWN M. YOUNG
JOHN JAY FOSSETT
STRAUSS & TROY
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202-4186
(513) 621-2121

Attorneys for Petitioners
C. Elvin Feltner, Jr.,
Palm Beach Properties, Inc., and
Metropolitan Properties, Inc.

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

1. Is the requirement of a "pattern" of racketeering activity for civil liability under RICO unconstitutionally vague?
2. Must the predicate acts of federal mail fraud and wire fraud in a civil RICO action be proven by clear and convincing evidence?
3. Must the enterprise in a civil RICO action have an ascertainable structure distinct from that inherent in the pattern of racketeering activity?
4. Is joint and several liability mandated in a civil RICO action?

PARTIES

PETITIONERS

(Defendants-appellants in the United States Court of Appeals for the Sixth Circuit):

1. C. Elvin Feltner, Jr.
2. Metropolitan Properties, Inc., aka Metropolitan Films, Inc.[1]
3. Palm Beach Properties, Inc., aka Palm Beach Films, Inc.[1]

RESPONDENTS

(Plaintiffs-appellees in the United States Court of Appeals for the Sixth Circuit):

1. Natividad Aumentado
2. Ken W. Chambers
3. Gordon M. Earle
4. Harry E. Fleischhauer
5. Bruce I. Forrester
6. Donald Forrester
7. Kathleen D. Forrester
8. Robert P. Gill
9. Dennis M. Harrington
10. Roger Houston
11. Charles E. Judd
12. C. T. Lee
13. Robert Mournighan and Ona Mournighan
14. Charles Mueller
15. James Ralph
16. REF Productions, Ltd. (an Ohio limited partnership)
17. Joseph Reisinger
18. Louis B. Updegrove
19. Daniel E. Wright and Carol B. Wright

---

[1] Petitioner C. Elvin Feltner, Jr. is the sole shareholder of Petitioners Metropolitan Properties, Inc., Palm Beach Properties, Inc., and of Respondent Krypton Corporation. Neither of the corporate Petitioners own stock in any other corporation. Sup. Ct. Rule 28.1.

(Other Defendants-appellants in the United States Court of Appeals for the Sixth Circuit):

1. Robert J. Levine

2. Krypton Corporation[2]

---

[2] Krypton Corporation has no interest in the outcome of this petition. Sup. Ct. Rule 19.6.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
Statement of the Case	
1. Statement of Facts	3
2. Proceedings Below	6
REASONS FOR GRANTING THE WRIT	
1. The Requirement of a Pattern of Racketeering Activity for Civil Liability Under RICO is Unconstitutionally Vague	10
2. The Predicate Acts of Mail Fraud and Wire Fraud In a Civil RICO Action Must be Proven by Clear and Convincing Evidence	16
3. The Enterprise in a Civil RICO Action Must Have an Ascertainable Structure Distinct from That Inherent in the Pattern of Racketeering Activity	20
4. Joint and Several Liability is not Mandated in a Civil RICO Action	23
CONCLUSION	28
APPENDIX	
Opinion and Supplementary Opinion issued, respectively, June 27 and August 31, 1989 by the United States Court of Appeals for the Sixth Circuit	1a,26a

Order entered August 13, 1987 by the district court trebling damages as determined by the jury and awarding plaintiffs their costs and attorneys fees 28a

Judgment entered August 13, 1987 by the district court on foregoing order entered that date 31a

Order entered October 29, 1987 denying defendants' post-trial motions 32a

Judgment issued June 27, 1989 by the United States Court of Appeals for the Sixth Circuit 34a

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961, 1962 and 1964 ..... 36a

TABLE OF AUTHORITIES

Cases	Page
Armco Industrial Credit Corp. v. SLT Warehouse Co., 782 F.2d 475 (5th Cir. 1986)	17
Baggett v. Bullitt, 377 U.S. 360 (1964)	12
B. F. Hirsch v. Enright Refining Co., Inc., 751 F.2d 628 (3d Cir. 1984)	22
Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), *on reh'g*, 710 F.2d 1361, *cert. denied*, 464 U.S. 1008 (1983)	21,22
Bennett v. United States Trust Co., 770 F.2d 308 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986)	22
Bishop v. Corbitt Marine Ways, Inc., 802 F.2d 122 (5th Cir. 1986)	22
Bosteve, Ltd. v. Marauszwski, 642 F. Supp. 197 (E.D.N.Y. 1986)	17
Cramp v. Board of Public Instruction, 368 U.S. 278 (1961)	12
Cullen v. Margiotta, 811 F.2d 698 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987)	17
Erie R.R. v. Tompkins, 304 U.S. 64 (1938)	18
Federal Communications Comm. v. American Broadcasting Co., 347 U.S. 284, *reh'g denied*, 347 U.S. 905 (1954)	12
Ford Motor Co. v. B & H Supply, Inc., 646 F. Supp. 975 (D. Minn. 1986)	17
Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), *aff'd sub nom.*, 473 U.S. 606 (1985)	16,20,22
H. J., Inc. v. Northwestern Bell Telephone Company, ___ U.S. ___, 108 S.Ct. 1219, 57 U.S.L.W. 4951 (1989)	10,11,12,13,14,15,22
Herman & MacLean v. Huddleston, 459 U.S. 375 (1983)	19

Table of Authorities Continued

	Page
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	11
KIRO, Inc. v. Commissioner, 51 T.C. 155 (1968)	5
Liquid Air Corp. v. Rogers, 834 F.2d 1297 (7th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3241 (1989)	17
Miller v. Affiliated Financial Corp., 624 F. Supp. 1003 (N.D. Ill. 1985)	27
Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981)	26
Owl Constr. Co., Inc. v. Ronald Adams Contractor, Inc., 642 F. Supp. 475 (E.D. La. 1986)	17
Platsis v. E.F. Hutton & Co., 642 F. Supp. 1277 (W.D. Mich. 1986), *aff'd*, 829 F.2d 13 (6th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1227 (1988)	17
Rae v. Union Bank, 725 F.2d 478 (9th Cir. 1984)	22
Santosky v. Kramer, 455 U.S. 745 (1982)	18
Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479 (1985)	10,11,16,18,19,24,25
Stainton v. Tarantino, 637 F. Supp. 1051 (E.D. Pa. 1986)	17
Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981)	25,26
United States v. Aleman, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 455 U.S. 946 (1980)	11
United States v. Bargaric, 706 F.2d 42 (2d Cir.), *cert. denied sub nom.*, 464 U.S. 840 (1983)	21
United States v. Bledsoe, 674 F.2d 647 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982)	20
United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976)	11

Table of Authorities Continued

	Page
United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983)	22
United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986)	27
United States v. Huber, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980)	11
United States v. Local 560, Int'l Brotherhood of Teamsters, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986)	17
United States v. Morelli, 643 F.2d 402 (6th Cir.), *cert. denied*, 453 U.S. 912 (1981)	11
United States v. Pantone, 609 F.2d 675 (3d Cir. 1979)	11
United States v. Parness, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975)	11
United States v. Riccobene, 709 F.2d 214 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983)	20,23
United States v. Swiderski, 593 F.2d 1246 (D.D.C. 1978), *cert. denied*, 441 U.S. 933 (1979)	11
United States v. Tillett, 763 F.2d 628 (4th Cir. 1985)	20
United States v. Turkette, 452 U.S. 576 (1981)	23
United States v. Weinstein, 762 F.2d 1522 (11th Cir. 1985), *modified, reh'g denied in part*, 778 F.2d 673 (1985), *cert. denied*, 475 U.S. 1110 (1986)	20
Wilcox v. First Interstate Bank, N.A., 815 F.2d 522 (9th Cir. 1987)	17,18
Statutes	
18 U.S.C. §§1961, 1962 and 1964	3,6,7,8,14,16
Constitution of the United States	
Amendment V	2,3

Table of Authorities Continued

Page

Other Authorities

Harper, James & Gray, *The Law of Torts* (1986) . 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ___

C. ELVIN FELTNER, JR., *et al.*,

Petitioners,

v.

HARRY E. FLEISCHHAUER, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, C. Elvin Feltner, Jr., Metropolitan Properties, Inc., and Palm Beach Properties, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The June 27, 1989 slip opinion and the August 31, 1989 Supplemental Opinion delivered by the United States Court of Appeals for the Sixth Circuit are reported at 879 F.2d 1290 and appear in the Appendix hereto beginning at page 1a. The order entered

August 13, 1987 by the United States District Court for the Southern District of Ohio trebling the jury's damage awards, the judgment also entered August 13, 1987 by the district court on that order and the jury's verdict, and the order entered October 29, 1987 by the district court denying defendants' post-trial motions are reproduced in the Appendix hereto beginning at page 28a.

JURISDICTION

Petitioners seek review of the judgment entered June 27, 1989 by the Sixth Circuit on the slip opinion issued that day by that court and, also, on the August 31, 1989 Supplemental Opinion issued in response to the petition for rehearing filed by Respondents in the Sixth Circuit on July 11, 1989. This petition is filed within 90 days of the Supplemental Opinion. 28 U.S.C. §2101(c). This Court has jurisdiction to review said judgment and Supplemental Opinion pursuant to 28 U.S.C. Section 1254(1). This case involves the following provisions of the Constitution of the United States and federal statutes:[3]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on

[3] 28 U.S.C. §2403(a) may be applicable. No court has certified to the Attorney General of the United States the fact that the constitutionality of the above referenced Act of Congress is drawn in question in this case. Sup.Ct. Rule 28.4(b).

> a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT, 18 U.S.C. Sections 1961, 1962 and 1964.

Found in the Appendix hereto beginning at page 36a.

STATEMENT OF THE CASE

1. Statement of the Facts

This controversy arises out of purchases by the first 19 listed Respondents of nontheatrical rights to distribute 23 films, consisting variously of full-length feature motion pictures and serial episodes.

The purchase contracts included the right to distribute the films on television and cable television, by videocassette, and for other viewing except in movie theaters. The purchase contracts were entered into with either Petitioners Metropolitan Properties, Inc. or Palm Beach Properties, Inc. in November or December of 1980 (except for Respondent Donald Forrester who contracted in late 1981).

Petitioners and the two Respondents-defendants[4] all allegedly participated in the marketing and sale of the film rights to the Respondents-purchasers. Krypton Corporation was not incorporated until September 28, 1982, but was alleged, nonetheless, to have actively engaged in the film marketing plan as early as November of 1980. Petitioner C. Elvin Feltner was the sole shareholder, a director, and the chairman of the three defendant corporations. Robert Levine was an officer of each of the defendant corporations.

In October 1980, Levine mailed a packet of information to Respondent Harry E. Fleischhauer, an investment advisor, on the availability of the films in question. Levine followed up the mailing by telephoning Fleischhauer. As a result of that conversation, Levine mailed Fleischhauer a "full kit" detailing the terms of the film program offered. Fleischhauer contacted Donald Forrester, his accountant and a certified public accountant, to review the full kit. Levine then traveled to Cincinnati in November to discuss the investment with Fleischhauer and Donald Forrester.

Most Respondents-purchasers received their information either directly or indirectly (through Fleischhauer or Forrester) from the full kit, a document more than 100 pages long and containing material relating to the tax benefits of the transaction, a list of film titles available, a purchase and sale agreement, copies of financing options, a 64-page legal opinion, and miscellaneous questions, answers and examples.

The transaction was described as a purchase for both income and tax-advantage purposes to be fi-

---

[4] Robert J. Levine and Krypton Corporation.

nanced through an initial down payment, the balance expected to be paid with interest from revenues generated by the buyers' distribution activity over a ten-year period. The purchase prices and down payments varied depending upon the nature of the film. The standard form contract included a provision for making the down payment in installments. Respondents-purchasers were to take full responsibility for arranging the distribution of the film. It was represented that the purchasers could enter into further distribution contracts providing that the distributor would retain 40% of the gross revenues without any reimbursement of expenses.

The full kit explained that a purchaser could obtain a refinancing agreement with an unaffiliated entity, Southwest Capital Corporation, in the event revenues were not sufficient to pay the purchase price over the ten-year period. It also addressed the tax implications of the purchase and discussed *KIRO, Inc. v. Commissioner*, 51 T.C. 155 (1968), under which the owner of film distribution rights was permitted a specified accelerated depreciation.

The full kit also advised that there was a significant chance a purchaser would be audited by the Internal Revenue Service because of earlier abuses regarding production and distribution of motion pictures. The purchasers were offered the opportunity to convert liability on the purchase contract from full recourse to nonrecourse in the event the IRS disallowed anticipated deductions and write-offs on the investment. A condition of the conversion option was that the purchaser contest the IRS determination.

A list of numerous distributors was provided to Fleischhauer. All Respondents-purchasers initially en-

tered into distribution contracts with Joseph Green Film Enterprises, Inc., which was not named as a defendant. Letters were provided to Green for the benefit of all the Respondents-purchasers in order that Green could obtain access to the films, but Green failed to secure distribution of any of the films. The Respondents-purchasers attributed this failure to the existence of "pirated" copies of the films, the poor quality of the copies provided to Green and/or the failure of the sellers to provide copies.

Because of the distribution problems, within a few months after execution of their purchase contracts, several Respondents-purchasers who had made only partial down payments began withholding further installment payments due. In all, Respondents-purchasers paid a total of $211,700 of the $346,600 due as down payments under their respective film purchase contracts.

Faced with demands that balances be paid and the failure to distribute the films, Bruce Forrester and Donald Forrester solicited the other Respondents-purchasers to pursue litigation.

2. Proceedings Below

Respondents-purchasers filed an action for fraud under Ohio common law and for violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.* ("RICO") against the three Petitioners and the two Respondents-defendants in the United States District Court for the Southern District of Ohio. The jurisdiction of the district court was invoked under 28 U.S.C. §1331 and 18 U.S.C. §1964(c) by reason of the RICO claims and under the

principle of pendent jurisdiction as to the state law fraud claims.

The first RICO claim, separately alleged by each plaintiff in the complaint, states, in part, that:

> defendants "... and John Does and Jane Does, enterprises engaged in and whose activities affect interstate commerce, did conduct and participate in their affairs through a 'pattern of racketeering activity,' as that term is defined in 18 U.S.C. Sections 1961(1) and 1961(5), and, in so doing, violated 18 U.S.C. Section 1962" thereby injuring plaintiffs in their business

and further that:

> "... defendants, acting as a group and constituting an enterprise as that term is defined in 18 U.S.C. Section 1961(4)" devised a scheme to defraud each plaintiff "in a manner prohibited by 18 U.S.C. Sections 1341 and 1343 and thereby violated 18 U.S.C. Section 1962."

The second RICO claim alleges, in part, that:

> "For the purpose of executing the aforesaid scheme" Messrs. Feltner and Levine "utilized, or caused to be utilized, the United States mail facilities in interstate commerce on two or more occasions and thereby violated 18 U.S.C. Sections 1341, 1343, and 1962"

and further that:

> Messrs. Feltner and Levine "did conduct and participate in the affairs of" defendants, "en-

> terprises engaged in and whose activities affect interstate commerce, through a 'pattern of racketeering activity,' as that term is defined in 18 U.S.C. Section 1961(1) and Section 1961(5), through a scheme, artifice, and device to defraud" and, in so doing, "injured plaintiffs in their business and property."

Defendants requested the district court instruct the jury that the burden of proof for plaintiffs on their RICO claims, as on their state law fraud claims, was by clear and convincing evidence. The district court instead adopted a preponderance of the evidence standard. Defendants also moved for a directed verdict, both at the conclusion of plaintiffs' case and of defendants' case. A primary basis for the motion was that Krypton had not been formed as a corporate entity until well after the sales to plaintiffs.

The jury was given ten separate interrogatories, five on the RICO claims, five on the common law fraud claims, and two separate damages charts, one for the RICO claims and the other for the common law fraud claims.

The jury answered the interrogatories by indicating that all defendants had violated the RICO statute and had committed both mail fraud and wire fraud (except that there was no wire fraud on the part of Krypton) and that all plaintiffs had been affected by either such mail or wire fraud. The jury at the same time did not find that any defendant had committed fraud under Ohio law. The jury assessed damages in favor of each of the 19 plaintiffs in various specific amounts against each of the five defendants, which damages totalled $1,317,177.

The district court then entered an order trebling the damages in favor of each plaintiff against each defendant to produce a total money judgment in the amount of $3,951,351. Defendants filed post-trial motions for directed verdict, judgment notwithstanding the verdict, and for a new trial. The district court denied all of the defendants' post-trial motions.

Petitioners and the two Respondents-defendants appealed to the United States Court of Appeals for the Sixth Circuit. Three distinct issues under RICO were raised on the appeal: (1) that the district court should have charged the jury that the burden of proof for the predicate acts of wire and mail fraud is clear and convincing evidence; (2) that plaintiffs failed to prove separate persons and an enterprise; and (3) that plaintiffs failed to prove a pattern of racketeering activity. Also raised on appeal were the issues of damages and the liability of Krypton. The Sixth Circuit affirmed the district court's instruction that the burden of proof was a preponderance of the evidence and found that plaintiffs had proven separate persons and an enterprise and, also, a pattern of racketeering activity, although the Sixth Circuit conceded the last issue was "a close question." The Sixth Circuit reversed the judgment against Krypton on the basis it had no legal existence as of the dates of the sales of the film distribution rights. The Sixth Circuit also reversed the damage award and held the amount recoverable by the plaintiffs-purchasers was limited to the actual amount each paid to the selling corporate defendant as listed in the chart attached to the defendants-appellants' brief. Finally, the Sixth Circuit, *sua sponte*, raised the issue of joint and several liability among defendants in a civil RICO action and,

relying on cases concerning criminal RICO violations, held that all defendants were jointly and severally liable for the total amount of damages incurred by each of the plaintiffs-purchasers.

Respondents-purchasers timely filed a petition for rehearing. The Sixth Circuit requested and received a response from the defendants and thereafter issued a Supplemental Opinion on August 31, 1989. The Sixth Circuit increased the damage award in favor of six purchasers in the total amount of $3,520 (for payments made to a nonparty on refinancing options) and remanded for determination by the district court whether the actual amount paid by two purchasers was $4,500 (as set forth in the damage chart) or $30,000 (as alleged in the petition for rehearing).

REASONS FOR GRANTING THE WRIT

1. The Requirement of a Pattern of Racketeering Activity for Civil Liability Under RICO is Unconstitutionally Vague.

This Court has addressed the pattern requirement in civil RICO cases on two occasions. In *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479 (1985), this Court acknowledged that "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors." 473 U.S. at 500. This Court attributed the "extraordinary" uses to which civil RICO has been put, at least partially, to the failure of Congress and the courts to develop a meaningful concept of "pattern." *Id.* Subsequently, in *H. J., Inc. v. Northwestern Bell Telephone Co.*, ___ U.S. ___, 108 S.Ct. 1219, 57 U.S.L.W. 4951 (1989), this Court acknowledged that:

> Congress has done nothing in the interim further to illuminate RICO's key requirement of a pattern of racketeering; and as the plethora of different views expressed by the Courts of Appeals since *Sedima* demonstrates, see n.2, *supra*, developing a meaningful concept of "pattern" within the existing statutory framework has proved to be no easy task.

57 U.S.L.W. at 4952. The futile struggle by the lower courts to define "pattern" and, with all due respect, the recent decision by this Court in *Northwestern Bell*, demonstrate that no judge, no jury, and no person can know with reasonable certainty what constitutes a RICO "pattern." The statute is incurably vague and for that reason is unconstitutional.[5]

This Court has recognized that a noncriminal statute is unconstitutionally vague under the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States where its language does not convey sufficiently definite warning as to the proscribed conduct. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967). A statute is

---

[5] Several courts of appeals have upheld the constitutionality of the RICO statute in a criminal context. *See, e.g., United States v. Morelli*, 643 F.2d 402 (6th Cir.), *cert. denied*, 453 U.S. 912 (1981); *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 455 U.S. 946 (1980); *United States v. Pantone*, 609 F.2d 675 (3d Cir. 1979); *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States v. Swiderski*, 593 F.2d 1246 (D.D.C. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

unconstitutional if it lacks "terms susceptible of objective measurement," *Cramp v. Board of Public Instruction*, 368 U.S. 278, 286 (1961), or where "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Baggett v. Bullitt*, 377 U.S. 360, 366 (1964).

In his concurring opinion in *Northwestern Bell*, Justice Scalia pointed out that since RICO has criminal applications it must, even in its civil applications, possess the degree of certainty required for criminal laws. 57 U.S.L.W. at 4957-58 (citing *Federal Communications Com. v. American Broadcasting Co.*, 347 U.S. 284, 296, *reh'g denied*, 347 U.S. 905 (1954)). The majority of this Court virtually admitted that the parameters of the elements of "pattern" remain vague and that potential defendants will be left guessing as to its meaning and as to whether their conduct falls within the concept:

> The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity" exists. The development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope.

57 U.S.L.W. at 4954. This language is just short of a declaration that this element of RICO does not possess the degree of certainty required by the Consti-

tution and the fundamental principles of justice and fair play.

In attempting to illuminate the elusive concept of "pattern," this Court in *Northwestern Bell* delved into the legislative history of RICO which, it was said, reveals Congress' intent that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." 57 U.S.L.W. at 4953. With respect to the relatedness aspect of this proof requirement, this Court found conspicuously absent in the text of RICO any identification of forms of relationship or external principles to be used in determining whether racketeering activity falls into a pattern for purposes of the Act. *Id.* This Court inferred from this absence, together with the relaxed limits to the pattern concept in §1961(5), that Congress must have intended to take a "flexible" approach and that it envisaged that a pattern might be demonstrated by a "range" of different ordering principles or relationships between predicates. *Id.* This Court ultimately borrowed the following language from Title X of the Organized Crime Control Act of 1970 to define the concept of relatedness: "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, violations, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* This definition is "utterly uninformative." *Id.* at 4957 (Scalia, J., concurring). It and the statement that Congress intended a "flexible" approach and that it envisaged a "range" of relationships provides no more notice to potential RICO

defendants as to whether their conduct may constitute a "pattern" than they possessed prior to *Northwestern Bell.*

When it attempted to define what must be proved by a plaintiff or prosecutor by way of continuity (a concept this Court found more difficult to define than relatedness), this Court acknowledged that "[t]his may be done in a variety of ways, thus making it difficult to formulate in the abstract any general test. . . ." *Id.* at 4954.

The Court's offering that "[c]ontinuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition" similarly fails to provide any more guidance as to what may constitute a pattern than its attempt to define "relatedness."

In addition to the fact that potential RICO defendants will not be able to predict with any certainty whether their conduct constitutes a pattern, this Court's vain struggle to define the concept will be multiplied countless times hence as the lower courts attempt to instruct juries in RICO cases. The district court charged the jury on the RICO pattern requirement as follows:

> Section 1962(c) of Title 18 of the United States Code provides in part that:
>
> > It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate . . . commerce, to conduct or participate, directly or indirectly, in the

> conduct of such enterprise's affairs through a pattern of racketeering activity. . . .
>
> * * *
>
> To show that a defendant has violated section 1962(c), plaintiff must prove each of the following elements by a preponderance of the evidence:
>
> 1. conduct
> 2. of an enterprise
> 3. through a pattern
> 4. of racketeering activity.
>
> A plaintiff can only recover to the extent he has been injured in his business or property by that conduct constituting the violation.
>
> * * *
>
> "*A pattern of racketeering activity*" requires more than one episode of criminal conduct occurring within the past 10 years. Separate acts in furtherance of the same criminal episode or transaction do not constitute a pattern of racketeering activity under RICO. "*Racketeering Activity*" consists of no more and no less than commission of a predicate act i.e. criminal violation of a federal statute concerning mail fraud or fraud by use of communication devices [wire fraud].

This intruction stands in stark contrast to the prolix explanation of the pattern requirement in *Northwestern Bell*. An instruction on the pattern requirement in conformity with this Court's views in *Northwestern*

Bell would, Petitioners respectfully submit, be such that persons "of common intelligence must guess at its meaning and differ as to its application."

2. The Predicate Acts of Federal Mail Fraud and Wire Fraud in a Civil RICO Action Must be Proven by Clear and Convincing Evidence.

This case presents the Court with the opportunity to decide an important issue of federal law: the appropriate standard of proof to be applied in civil RICO actions. "In the courts, the appropriate standard of proof in the various forms of civil RICO actions are not yet firmly settled, and the relevant considerations are numerous." *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 404 (7th Cir. 1984), *aff'd sub nom.*, 473 U.S. 606 (1985).

Petitioners argued on appeal to the Sixth Circuit that the district court had erred in instructing the jury that plaintiffs need only prove the predicate acts of wire fraud and mail fraud by a preponderance of the evidence. In rejecting Petitioners' argument that the burden of proof on these issues should be clear and convincing evidence, the Sixth Circuit stated that "[t]he Supreme Court has hinted, but not held," that the appropriate evidentiary standard was a preponderance of the evidence. 879 F.2d at 1296 (citing *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 491 (1985)).

This Court has never directly ruled on the appropriate standard of proof in civil RICO actions. In *Sedima*, this Court rejected the view of the Second Circuit that civil liability under RICO requires a prior conviction of a predicate act and stated, in dictum: "We are not at all convinced that the predicate acts

must be established beyond a reasonable doubt in a proceeding under §1964(c). . . . But we need not decide the standard of proof issue today." 473 U.S. at 491. This statement has been taken by the lower federal courts to be a "strong suggestion" by this Court that the proper burden of proof of predicate acts in RICO litigation is by a preponderance of the evidence. *See, e.g., Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1302 (7th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3241 (1989); *Wilcox v. First Interstate Bank, N.A.*, 815 F.2d 522 (9th Cir. 1987); *Cullen v. Margiotta*, 811 F.2d 698, 731 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987); *Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 480-81 (5th Cir. 1986); *United States v. Local 560, Int'l Brotherhood of Teamsters*, 780 F.2d 267, 279-80 n.12 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986); *Ford Motor Co. v. B & H Supply, Inc.*, 646 F. Supp. 975, 1001 (D. Minn. 1986); *Bosteve, Ltd. v. Marauszwski*, 642 F. Supp. 197, 202 n.7 (E.D. N.Y. 1986); *Owl Constr. Co., Inc. v. Ronald Adams Contractor, Inc.*, 642 F. Supp. 475, 477 (E.D. La. 1986); *Platsis v. E.F. Hutton & Co.*, 642 F. Supp. 1277, 1309 (W.D. Mich. 1986), *aff'd*, 829 F.2d 13 (6th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1227 (1988); *Stainton v. Tarantino*, 637 F. Supp. 1051, 1070 (E.D. Pa. 1986).

There are many sound and cogent reasons why a clear and convincing evidence standard is required in civil RICO actions. The instant case illustrates the presumably common situation where a plaintiff alleges both a RICO claim based on predicate acts of federal criminal wire and mail fraud, and, a common law fraud claim. The jury was instructed by the district court that the elements of a RICO violation, including

the predicate acts, must be proven by a preponderance of the evidence. The district court also instructed the jury that common law fraud must be proven by clear and convincing evidence and that fraud is never presumed. Defendants were held liable for treble damages under RICO arising from predicate acts of federal criminal mail and wire fraud, whereas, based on the very same conduct, no liability for fraud at common law was found. This incongruous result arose solely from the different burdens of proof on the federal statutory fraud and state common law fraud claims.

The federalization of common law fraud by RICO has been noted in this Court. *Sedima*, 473 U.S. at 501-502 (Marshall, J., dissenting). Prior to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), federal common law required clear and convincing evidence of fraud. *Wilcox v. First Interstate Bank, N.A.*, 815 F.2d 522, 534 (9th Cir. 1987) (Boochever, J., dissenting). To add to this federalization the treble damage and attorneys fees provisions of RICO *and* a lower standard of proof is an incredible result.

In *Santosky v. Kramer*, 455 U.S. 745 (1982), this Court identified the following factors to be considered when determining whether a particular standard of proof in a particular proceeding satisfies due process: 1) the private interests affected by the proceeding; 2) the risk of error created by the chosen procedure; and 3) the countervailing governmental interest supporting use of the challenged procedure. 455 U.S. at 754. Thus, in civil disputes over money damages without more, application of a preponderance of the evidence standard indicates society's minimal concern with the outcome and a conclusion that the litigants

should share the risk of error in roughly equal fashion. By contrast, this Court has mandated a higher standard of proof—"clear and convincing evidence"—when the individual interests at stake are both "particularly important" and "more substantial than mere loss of money." *Id.* at 756. This Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma." *Id.*

There can be no doubt but that a finding of liability under RICO carries a heavy stigma. It is fundamentally unfair to say that conduct that can be punished as criminal only upon proof beyond a reasonable doubt need be proven only by a preponderance of the evidence to impose civil liability under RICO. This unfairness is, by example, illustrated by a defendant who is alleged to have committed two murders as the requisite predicate acts in a civil RICO suit. *Sedima* held that a prior conviction of a predicate act is not a prerequisite to civil liability under RICO. Thus, under the standard applied by the courts of appeals and district courts after *Sedima*, this defendant can be found by a jury to have committed the underlying predicate acts and be publicly stigmatized as a murderer and racketeer only upon a mere "more probable than not" standard.

The interests of defendants in RICO cases differ qualitatively from the interests of defendants sued for violations of other federal statutes, such as the federal securities and antitrust laws in which a preponderance of the evidence standard is applied. *Cf. Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983). Unlike defendants in those other federal law actions, RICO

defendants risk emerging from the litigation "convicted" of at least two counts of a federal or state felony.

The Seventh Circuit has suggested that requiring private RICO plaintiffs to prove the elements of a section 1962 violation *beyond a reasonable doubt* "could address some of the legitimate concerns about unfair stigmatization of defendants as 'racketeers' and other abuses of RICO's criminal dimensions through civil proceedings." *Haroco*, 747 F.2d at 404. "RICO liability must be based, after all, on findings of criminal conduct." *Id.*

3. The Enterprise in a Civil RICO Action Must Have an Ascertainable Structure Distinct from That Inherent in the Pattern of Racketeering Activity.

This case presents this Court the opportunity to address and to define the enterprise requirement and to resolve a conflict between the federal courts of appeals.

The Sixth Circuit in this case acknowledged there exists a split of authority as to whether the "enterprise" under RICO must have an "ascertainable structure, distinct from that inherent in the pattern of racketeering activity." 879 F.2d at 1297 n.4. This requirement has been adopted by three circuits[6] and rejected by two.[7]

---

[6] *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985); *United States v. Bledsoe*, 674 F.2d 647, 663-64 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982); *United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983).

[7] *United States v. Weinstein*, 762 F.2d 1522, 1537 n. 13 (11th Cir.), *modified, reh'g denied in part*, 778 F.2d 673 (1985), *cert.*

Respondents-purchasers failed to allege or otherwise prove that the alleged enterprise was an entity separate and distinct from the pattern of racketeering activity in which they claimed the defendants were engaged. The facts in this case point out precisely why this Court and courts of appeals have required that a RICO enterprise be separate and distinct from the pattern of racketeering activity. Respondents-purchasers alleged that all defendants, individually and collectively, were enterprises. An amorphous "enterprise" such as this, with no ascertainable structure, merges into the "pattern of activity" so that neither element is distinct or separable, causing the confusion that manifested itself in the jury decision in this case.

From the pleadings it is unclear whom Respondents-purchasers allege to be "persons" and whom they allege to be "enterprises" under RICO. In the first cause of action under RICO, each of the 21 named plaintiffs alleged that all of the defendants, both separately and in the aggregate, were "enterprises." In the second cause of action under RICO, the plaintiffs seemed to allege, although it is not clear, that Messrs. Feltner and Levine were persons who conducted and participated in the affairs of the corporate defendants described as "enterprises engaged in and whose activities affect interstate commerce."

The Sixth Circuit has stated that the distinction between the "person" and the "enterprise" must be described in RICO pleadings. 879 F.2d at 1296-97 (citing *Bennett v. Berg*, 685 F.2d 1053, 1061 (8th Cir.

---

denied, 475 U.S. 1110 (1986); and *United States v. Bargaric*, 706 F.2d 42, 55 (2d Cir.), *cert. denied sub nom.*, 464 U.S. 840 (1983).

1982), *on reh'g*, 710 F.2d 1361, *cert. denied*, 464 U.S. 1008 (1983)). In addition, courts have been virtually unanimous in holding that a defendant cannot be simultaneously the "enterprise," against which damages are not recoverable, and a "person" who conducts the affairs of the enterprise through a pattern of racketeering activity and against whom damages are properly recoverable. *See, e.g., Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 123 (5th Cir. 1986); *Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1985); *Haroco v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985); *B. F. Hirsch v. Enright Refining Co., Inc.*, 751 F.2d 628 (3d Cir. 1984); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982), *on reh'g*, 710 F.2d 1361, *cert. denied*, 464 U.S. 1008 (1983). Similarly, in *H. J., Inc. v. Northwestern Bell Telephone Company*, ___ U.S. ___, 108 S.Ct. 1219, 57 U.S.L.W. 4951, 4952 n.1, this Court acknowledged that the district court found plaintiffs' complaint defective because it failed to "allege the existence of an 'enterprise' separate and distinct from the 'person identified,' but refused to express an opinion as to the soundness of this holding.

Despite the overwhelming weight of authority holding that one may not simultaneously be a person and an enterprise in a RICO action, Respondents-purchasers accomplished this simultaneity in the instant case. In their pleadings they alleged all defendants were enterprises. If this were true, then none could

be a person against whom damages were recoverable. By the same reasoning, if any one of the defendants was the enterprise—a corporate defendant, for example—then damages were not recoverable against it. In this case, the jury assessed damages against *all* named defendants.

In *United States v. Turkette*, 452 U.S. 576, 583 (1981), this Court stated that "the 'enterprise' is not the 'pattern of racketeering activity;' it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved. . . ."

In *United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983), the court, relying upon the above-quoted language from *Turkette*, stated that to prove that an entity is separate and distinct from a pattern of racketeering activity, the plaintiff must show that the entity "has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses."

This petition affords this Court the opportunity to extend its prior holding on the nature of a RICO enterprise and to resolve the conflict between the courts of appeals as to whether proof of a distinct "ascertainable structure" is required.

4. Joint and Several Liability is not Mandated in a Civil RICO Action.

The Sixth Circuit raised *sua sponte* the question of whether liability for a civil violation of RICO must be joint and several. Despite the fact that RICO itself does not address this issue and it was not raised on

appeal, the court held that the defendants were jointly and severally liable for the total of all damages assessed against each of them individually.

Along with interrogatories, the district court presented the jury with two charts to calculate damages, if awarded, one under the RICO claims and one under the Ohio common law fraud claims. Each chart consisted of 19 horizontal columns, one for each plaintiff, and five vertical columns, one for each defendant. This grid of 95 separate calculations was completed by the jury in assessing damages on the RICO claims.

The Sixth Circuit held that "[a]lthough there is little direct law on this point, there are numerous RICO criminal forfeiture cases which indicate that the nature of the RICO offense mandates joint and several liability." The Sixth Circuit thus concluded the district court had erred in instructing the jury to award damages against each defendant separately and individually. 879 F.2d at 1301.

The Sixth Circuit's reliance upon criminal forfeiture cases to determine whether joint and several liability is appropriate in a civil RICO case is misplaced. Instead of relying upon statutory provisions dealing with criminal forfeiture, the court should have examined federal statutes that impose civil liability in the same manner as RICO, specifically the federal antitrust statutes.

The legislative history of the private treble-damages remedy found in RICO indicates that Congress "borrowed" the remedy from the federal antitrust statutes. *Sedima*, 473 U.S. at 486-88. The civil remedies in the RICO bill passed by the Senate, S 30, were limited to injunctive actions by the United States. *Id.*

at 486. During hearings on S 30 before the House Judiciary Committee, Representative Steiger proposed the addition of a private treble-damages action "similar to the private damage remedy found in the anti-trust laws. . . ." *Id.* at 487 (citing Hearing on S 30, and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 520 (1970)). In summarizing the bill on the House floor, its sponsor described the treble-damages provision as "another example of the anti-trust remedy being adapted for use against organized criminality." *Sedima*, 473 U.S. at 487 (citing 116 Cong. Rec. 35295 (1970)).

The treble-damages provision of RICO tracks virtually word for word the treble-damages provision of the antitrust laws, §4 of the Clayton Act. As the dissent recognized in *Sedima*, the parallel between these two statutes offers "little doubt that the latter served as a model for the former." *Sedima*, 473 U.S. at 510. Thus, it is aphoristic that an interpretation of the private-damages provision of the antitrust laws would prove helpful in interpreting the private-damages provision of RICO.

In *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), this Court held that antitrust defendants against whom civil damages, costs, and attorney's fees had been assessed had no right to contribution under federal statutory or common law. The principles of contribution and of joint and several liability are related concepts dealing with apportionment of damages among tortfeasors. The application of these concepts with respect to federal statutes can arise in only two ways: first, through the affirmative creation of such doctrines by Congress, either ex-

pressly or by clear implication; or, second, through the power of the federal courts to fashion a federal common law establishing such principles. *See Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 90-91 (1981).

This Court concluded in *Texas Industries* that Congress neither expressly nor implicitly intended to create a right to contribution under antitrust laws. This Court held that the federal common law did not create such a right in such actions. Instead, this Court, after examining the detailed and specific remedial provisions of antitrust laws and finding that they did not address the issue of contribution, held that neither the Sherman Act nor the Clayton Act conferred on federal courts the right to contribution.

> The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. (Citation omitted).
>
> * * *
>
> There is nothing in the statute itself, in its legislative history, or in the overall regulatory scheme to suggest that Congress intended courts to have the power to alter or supplement the remedies enacted.

Texas Industries, 451 U.S. at 645.

Similarly, there is nothing in the RICO statute itself, or its legislative history, or its overall regulatory scheme to suggest that Congress intended for defendants to be jointly and severally liable for vio-

lations of the Act. Indeed, the RICO provision on private damages is virtually identical to the private damages provision in the federal antitrust laws. If Congress had intended to include the common law tort concepts of contribution and joint and several liability in civil RICO, it would have specifically provided therefor. *See Miller v. Affiliated Financial Corp.*, 624 F. Supp. 1003, 1004 (N.D. Ill. 1985) (contribution is not available as to RICO liability).

Even if the common law tort principle of joint and several liability can be applied in RICO cases, it should not be applied in the instant case, where the jury went to great length to make 95 separate damage calculations—one set for each of the 19 plaintiffs against each of the five defendants.

It is an axiomatic principle of tort law that "where the independent concurring acts have caused distinct or separate injuries to the plaintiff, or *where some reasonable means of apportioning the damages is evident, the courts generally will not hold the tortfeasors jointly and severally liable.*" Harper, James & Gray, *The Law of Torts* §10.1 at 5 (1986) (emphasis added). An appellate court cannot *sua sponte* impose joint and several liability upon the defendants after the jury has apportioned the damages among them.

In holding that the defendants were jointly and severally liable, the Sixth Circuit applied by analogy criminal RICO cases imposing joint and several liability with respect to forfeitures. The court's reliance upon these cases is questionable at best. First, valid issues have been raised as to whether the imposition of joint and several liability is proper in the criminal context at all. *See United States v. Caporale*, 806 F.2d 1487, 1507 (11th Cir. 1986). Second, the goals sought

to be accomplished by criminal RICO and the method used to attain such goals are different than those sought to be accomplished by civil RICO. For instance, as discussed above, the standard of proof required in a criminal RICO case of beyond a reasonable doubt is far more stringent than the preponderance of the evidence standard of proof applied in the instant civil RICO case.

If criminal and civil RICO were both designed to punish, as Respondents-purchasers have suggested, the Sixth Circuit properly recognized that the application of the treble multiplier to damages is sufficient to accomplish this purpose. 879 F.2d at 1299. To impose joint and several liability in addition to this trebling provision goes beyond any punitive purpose intended by Congress. This is especially true for a defendant whose involvement in an alleged pattern of racketeering activity is either partial or minimal, but because of the insolvency of more culpable defendants, is required to pay the entire amount of damages awarded. Such a rule is simply and manifestly unfair: under it, Oliver Twist and each of Fagin's boys, as well as Fagin himself, would be liable to pay all of the money pickpocketed, regardless of who snatched it or who among them kept it.

CONCLUSION

Based upon the foregoing, Petitioners respectfully submit that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

RICHARD BOYDSTON
Counsel of Record
SHAWN M. YOUNG
JOHN JAY FOSSETT
STRAUSS & TROY
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202-4186
(513) 621-2121

Attorneys for Petitioners
C. Elvin Feltner, Jr.,
Palm Beach Properties, Inc., and
Metropolitan Properties, Inc.

APPENDIX

No. 87-4060

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HARRY E. FLEISCHHAUER, et al.,
Plaintiffs-Appellees,

v.

C. ELVIN FELTNER, JR., et al.,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Southern District of Ohio, Western Division

---

Decided and Filed June 27, 1989

Before: KRUPANSKY and WELLFORD, Circuit Judges; and JOINER,* Senior District Judge.

WELLFORD, Circuit Judge. This appeal follows a jury verdict awarding appellees treble damages of $3,951,351.00 for RICO violations associated with appellees' participation in appellants' film investment program. Appellants raise several issues regarding liability and damages. We affirm the liability determination, except as to Krypton, and reverse, in part, the damages award.

---

*The Honorable Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

I. FACTS

This controversy arose when 19 separate plaintiffs purchased non-theatrical rights to the distribution of 23 full length feature motion pictures and television episodes from five defendants.[1]

The rights in the films the plaintiffs purchased included the right to distribute the films on television and cable television, by video cassette, and for other viewing except in movie theaters. Most plaintiffs entered into contracts with either Metropolitan or Palm Beach in November or December of 1980, but Donald Forrester entered into a contract with Metropolitan in early 1981.

The five defendants all allegedly participated in the marketing and sale of the film rights to the plaintiffs. Metropolitan and Palm Beach sold to the plaintiffs the distribution rights to the films. Krypton was not incorporated until September 28, 1982, but it is alleged, nonetheless, that Krypton was actively engaged in the film marketing plan as early as November of 1980. Feltner was the sole shareholder, a director and the chairman of the three defendant corporations. Mr. Levine, an attorney, was an officer of each defendant corporation.

In October, 1980, Levine mailed a packet of information to Fleischhauer, an investment advisor, on the availability of the films in question. Levine followed up the mailing by telephoning Fleischhauer. As a result of that conversation, Levine mailed Fleischhauer a "full kit" detailing the terms of the film program offered. Fleischhauer contacted Donald Forrester, his accountant and a certified professional accountant, to review the full kit. Levine then traveled to Cincinnati

---

[1]The defendants are: C. Elvin Feltner, Jr., Robert J. Levine, Palm Beach Properties, Inc., a/k/a Palm Beach Films, Inc. (Palm Beach), Metropolitan Properties, Inc., a/k/a Metropolitan Films, Inc. (Metropolitan), and Krypton Corporation (Krypton).

in November to discuss the investment with Fleischhauer and Donald Forrester and afterward Fleischhauer checked references Levine furnished.

In the agreement reached at the meeting, Fleischhauer was to receive a 10% commission on each sale Metropolitan made and a 20% commission on each sale Palm Beach made. Fleischhauer agreed to share the commissions with Donald Forrester. Fleischhauer received $56,000 in commissions on sales of the film rights to the plaintiffs. At oral argument, appellees noted that no evidence was admitted indicating that Fleischhauer paid any commissions to Donald Forrester. All other plaintiffs were initially advised of the investment opportunity by Fleischhauer or by Donald Forrester.

Most plaintiffs received their information either directly or indirectly (through Fleischhauer or Forrester) from the full investment kit, in which a written explanation of the prospective investment was set forth. This kit is over 100 pages long and contains material relating to the tax benefits of the transaction, a list of film titles available, a purchase and sale agreement, copies of financing options, a 64 page legal opinion and miscellaneous questions, answers and examples.

The transaction was described by the seller defendants as a purchase for both income and tax advantage purposes to be financed through an initial "down payment," the balance expected to be paid with interest from revenues generated by the buyers' distribution activity over a ten year period. The purchase prices and down payments varied depending upon the nature of the film.[2] The standard form contract included a provision for making the down payment in installments. Buyer plaintiffs were to take full responsibility for arranging the distribution of the film. Sellers represented that plaintiffs could enter into further distribution contracts pro-

---

[2]The required down payment was, generally, approximately five percent higher in a sale by Palm Beach than one offered by Metropolitan.

viding that the distributor would retain 40% of the gross revenues without any reimbursement of expenses.

The kit issued by defendants explained that a plaintiff could obtain a refinancing agreement with an unaffiliated entity, Southwest Capital Corporation, in the event revenues were not sufficient to pay the purchase price over the ten year period. It also addressed the tax implications of the purchase and discussed *KIRO, Inc. v. Commissioner,* 51 T.C. 155 (1968). (Under that decision, the owner of film distribution rights was permitted under certain circumstances to deduct 100% of the purchase price of the films over 7 years at a rate of 60% in the first year, 15% in the second year, and 5% for each of the following five years.)

Through the kit materials furnished, defendants also advised interested parties that there was a significant chance that the purchaser would be audited by the Internal Revenue Service because of earlier abuses regarding production and distribution of motion pictures. Defendants offered to convert liability on the purchase contract from full recourse to nonrecourse in the event the IRS disallowed anticipated deductions and write-offs on the investment. A condition of that conversion option was that the purchaser plaintiff must contest the IRS determination.

A list of numerous distributors was provided to Fleischhauer, but it was expected that those films which were episodes in a series would be handled by a single distributor. In the event all episodes in a series were not sold, the seller agreed to make the unsold episodes available to the purchaser's distributor.

A number of the plaintiffs testified that they never spoke with either Feltner or Levine prior to purchasing their film and that they relied solely on the advice of Fleischhauer. Plaintiff Ralph testified that he spoke to neither Feltner nor Levine before purchasing his film but relied solely on the advice of Fleischhauer and Donald Forrester and his own

review of the kit. Several plaintiffs testified that they spoke with Levine before signing his contract on limited subjects such as selection of film or the distribution process. Only four plaintiffs, including the Forresters and Fleischhauer, spoke with Feltner before purchasing their film rights.

There was no evidence about the identity of the particular seller in the case of four other plaintiffs.[3] Six plaintiffs purchased their films from Metropolitan; the remaining plaintiffs purchased their films from Palm Beach.

All plaintiffs allegedly entered intitially into distribution contracts with Joseph Green Film Enterprises, Inc. (Green) which was not named as a defendant. Access letters were provided to Green for the benefit of all plaintiffs in order that Green could obtain access to the films, but Green failed to secure distribution of any of the films because many unauthorized copies of the films were available to those who wished to use them and the copies plaintiffs purchased were of poor quality. Testimony was offered that Levine knew, before the films were sold, that the films were not marketable either because they were unauthorized copies or because unauthorized copies were readily available.

Because they were unsuccessful in efforts to distribute or lease the films, several plaintiffs who had made only partial down payments withheld the balances within a few months after execution of their contracts. Others testified that although they obtained options with Southwest Capital Corporation to extend the ten year period in which the contract balance was to be paid, they subsequently failed to pay the required annual fee to preserve that option.

As a result of their failure and resulting frustration in effecting distribution of their films, plaintiffs were solicited

---

[3]There were also six plaintiffs as to which there was no contract identified, offered, or admitted into evidence.

by Bruce Forrester and Donald Forrester to pursue this litigation against defendants seeking compensatory and punitive damages and attorney's fees, based on RICO charges and Ohio common law fraud.

Appellants have submitted a chart, which is attached as an appendix, compiled from trial testimony and exhibits, setting out pertinent data concerning each plaintiff, the purchase price involved, the actual payment made to defendant or defendants, whether that plaintiff who claimed tax write-offs was audited, a purported outline of tax treatment, and damage awards rendered (before any trebling of the award under RICO). Appellees have not challenged appellants' computations. In all, fourteen of the nineteen investors were audited by the Internal Revenue Service, which disallowed very substantial deductions claimed. The bulk of damages awarded to plaintiffs was against defendant Feltner. Donald Forrester, as an extreme example, paid nothing on his investment of $162,500, yet claimed $97,500 worth of tax benefits which have been challenged by IRS. Donald Forrester was awarded, nonetheless, almost $171,500 in damages subject to trebling. Fleischhauer invested some $138,500, paid only $200 and claimed $40,000 in tax benefits, which was challenged by IRS. He was awarded $56,754 in damages (apart from commissions and trebling). Total damages awarded all plaintiffs, before trebling, against the defendants was $1,317,117.00.

Of the nineteen investments made, fourteen of the nineteen investors were audited by the Internal Revenue Service for deductions taken relating to their film purchase.

The first RICO claim by each plaintiff alleges, in part, as follows:

> Defendants "... John Does and Jane Does, enterprises engaged in and whose activities affect interstate commerce, did conduct and participate in their affairs through a 'pattern of racketeering activity,' as that term is defined in 18 U.S.C. §§ 1961(1) and

> 1961(5), and in so doing, violated 18 U.S.C. § 1962" thereby entering plaintiffs and their business [and, further, that].
>
> ". . . defendants, acting as a group and constituting an enterprise as that term is defined in 18 U.S.C. § 1961(4)" devised a scheme to defraud each plaintiff "in a manner prohibited by 18 U.S.C. §§ 1341 and 1343 and thereby violated 18 U.S.C. § 1962."

The second RICO claim by each plaintiff alleges, in part, that:

> "for purpose of executing the aforesaid scheme" Messrs. Feltner and Levine "utilized, or caused to be utilized, the United States Mail facilities in interstate commerce on two or more occasions and thereby violated 18 U.S.C. §§ 1341, 1343, and 1962" [and further, that]
>
> Messrs. Feltner and Levine "did conduct and participate in the affairs of" defendants, "enterprises engaged in and whose activities affect interstate commerce, through 'pattern of racketeering activity,' as that term is defined in 18 U.S.C. § 1961(1) and § 1961(5), through a scheme, artifice, and device to defraud" and, in so doing, "injured plaintiffs in their business and property."

Defendants requested the district court to instruct the jury that the burden of proof for plaintiffs on their RICO claims as in the case of their state law fraud claims, was by clear and convincing evidence. The district court instead adopted a preponderance of the evidence standard. Defendants also moved for a directed verdict, both at the conclusion of plaintiffs' case and of defendants' case. A primary basis for the motion, on the part of Krypton, was that it had not been formed as a corporate entity until well after the sales to plaintiffs.

In closing argument to the jury, plaintiffs contended that the damages they sustained were the actual total purchase price of the films acquired, plus the down payments actually paid, plus the penalty and interest they incurred in tax charges and "everything they had to go through and are still going through" as a result of the alleged wrongdoing by defendants.

Submitted to the jury with the instructions were ten separate interrogatories, five on the RICO claims, five on the common law fraud claims, and two separate damages charts, one for the RICO claims and the other for common law fraud claims.

The jury answered these interrogatories by indicating that all defendants had violated the RICO statute and had committed both mail fraud and wire fraud (except that there was no wire fraud on the part of Krypton), and that all plaintiffs had been affected by either such mail or wire fraud. The jury at the same time did not find any defendant had committed fraud under Ohio law.

The district court then entered an order trebling the damages in favor of each plaintiff against each defendant to produce a total money judgment in the amount of $3,951,351. It is unclear how damages were calculated and what basis existed for the differentiation between the defendants in damages allocation. Defendants filed post-trial motions for directed verdict, judgment notwithstanding the verdict and for a new trial. The district court denied all of defendants' post-trial motions and this appeal ensued.

II. LIABILITY

Under 18 U.S.C. § 1962(c), it is unlawful:

> for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct

> or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

The terms "enterprise," "person," "racketeering activity," and "pattern of racketeering activity" are defined in 18 U.S.C. § 1961, as follows:

> (1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of [18 U.S.C.]: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . .
>
> . . . . .
>
> (3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;
>
> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
>
> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity, ...

A private right of action is provided for a person injured in his business or property by reason of a RICO violation. 18 U.S.C. § 1964(c).

On appeal appellants raise several questions regarding civil RICO liability: (1) did the judge instruct the jury properly on the evidentiary standard; (2) have plaintiffs differentiated between liable "persons" and the RICO "enterprise"; (3) have plaintiffs proven the existence of a RICO "pattern"; and (4)

is Krypton, an unformed corporation, a "person" liable for RICO violations.

A. *Burden of Proof*

Appellants claim that the district court erred in instructing the jury that plaintiff must prove each of the predicate wire and mail fraud violations by a preponderance of the evidence. They contend that because this RICO action is premised upon federal wire and mail fraud—criminal offenses that have no corresponding private rights of action—a higher standard of proof is required. They also contend that the court should have adopted the burden of proof applicable to state law fraud actions. This is essentially the position advocated in a dissent to a RICO decision in the Ninth Circuit. *See Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 532-35 (9th Cir. 1987) (Boochever, J., dissenting).

We reject these contentions; a preponderance standard is the appropriate standard of proof. The Supreme Court has hinted, but not held, that this is the appropriate evidentiary standard. The Court stated: "We are not at all convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under § 1964(c). In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985). Other circuits specifically addressing this issue have followed the Court's suggestion. *See Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1302 (7th Cir. 1987); *Wilcox*, 815 F.2d at 531; *Cullen v. Margiotta*, 811 F.2d 698, 731 (2d Cir.), *cert. denied*, 107 S. Ct. 3266 (1987); *Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 480-81 (5th Cir. 1986); *United States v. Local 560, Int'l Brotherhood of Teamsters*, 780 F.2d 267, 279-80 n.12 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986). Appellants' contentions were raised, discussed and rejected in *Liquid Air*, and we are in agreement. 834 F.2d at 1301-03.

B. *Distinguishing RICO "Persons" from the RICO "Enterprise"*

Appellants argue that plaintiffs' pleadings do not adequately describe the "enterprise" and the "persons" participating in the "enterprise." Only "persons" can be held liable for RICO violations; the "enterprise" itself is not liable. 18 U.S.C. § 1962(c). *See, e.g., Yellow Bus Lines, Inc. v. Local Union 639,* 839 F.2d 782 (D.C. Cir.), *cert. denied,* 109 S. Ct. 309, (1988). The "person" and the "enterprise" must be separate and different entities. *See, e.g., United States v. Feldman,* 853 F.2d 648, 656 (9th Cir. 1988), *cert. denied,* 109 S. Ct. 1164 (1989). This distinction must be described in the pleadings. *Bennett v. Berg,* 685 F.2d 1053, 1061 (8th Cir. 1982), *cert. denied,* 464 U.S. 1008 (1983).

The pleadings in this case satisfactorily describe and distinguish the "persons" and the "enterprise." The statute defines an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). We believe the pleadings adequately state that each of the five defendants was a "person" and together they formed a racketeering "enterprise." An enterprise must be merely "an ongoing organization, formal or informal." *United States v. Turkette,* 452 U.S. 576, 583 (1981). In this case, Metropolitan, Palm Beach, Krypton, Levine and Feltner comprised such a group. *See also Feldman,* 853 F.2d at 655-56 (individuals and corporations can associate to create RICO "enterprise").

Appellant contends that the "enterprise" alleged and proven was not sufficiently distinct from the "person"—in other words, because Feltner owned 100% of the corporations, they were the equivalent of his "right arm," with whom he could not "conspire." *See United States v. Computer Sciences Corp.,* 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied,* 459 U.S. 1105 (1983). Such argument has no merit; the fact

that Feltner owned 100% of the corporations' shares does not vitiate the fact that these corporations were separate legal entities. *See Feldman*, 853 F.2d at 656 (stating, "[i]f one corporation possesses an existence separate from its incorporator, clearly a group of corporations formed by defendant is also distinct"); *United States v. Benny*, 786 F.2d 1410 (9th Cir.), *cert. denied*, 479 U.S. 1017 (1986); *McCullough v. Suter*, 757 F.2d 142, 143-44 (7th Cir. 1985). Clearly, the jury had ample basis to find that all defendants were collectively, the "enterprise."[4]

C. *The Existence of a RICO "Pattern"*

Appellants contend that their conduct did not amount to a "pattern of racketeering activity" required for RICO liability. 18 U.S.C. § 1962(c). The statute defines "pattern of racketeering activity" as "at least two acts of racketeering activity" occurring within a ten year period. 18 U.S.C. § 1961(5). Despite the language of the statute, the Supreme Court has stated that "while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern.' " *Sedima*, 473 U.S. at 496 n.14. Instead, quoting legislative history, the Court observed that

---

[4]We note that there is a split of authority as to whether the "enterprise" must have an " 'ascertainable structure,' distinct from that inherent in the pattern of racketeering activity." *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982). Such a requirement of "ascertainable structure" has been adopted in *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985); *Bledsoe*, 674 F.2d at 665; *United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983); it has been rejected in *United States v. Weinstein*, 762 F.2d 1522, 1537 n.13 (11th Cir.), *modified*, 778 F.2d 673 (1985), *cert. denied*, 475 U.S. 1110 (1986); and *United States v. Bargaric*, 706 F.2d 42, 55 (2d Cir.), *cert. denied sub nom.*, 464 U.S. 840, (1983).

Because appellant has failed to raise this as a basis for reversal we need not address this troublesome issue.

isolated incidents of "racketeering activity" do not implicate Congress' concerns about organized crime infiltrating legitimate business activity. Therefore, it repeated the language of the Senate Report stating " '[i]t is this factor of *continuity plus relationship* which combines to produce a pattern.' " *Id.* (emphasis added by Court).

The Supreme Court has heard argument on a case dealing with the "pattern" requirement and will perhaps provide additional guidance in the application of the "continuity plus relationship" test. *See H. J., Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988).

In the meantime, however, we believe that the Third and Seventh Circuits have correctly ascertained the Court's inclinations regarding the "pattern" requirement. "In determining whether the predicate acts are sufficiently continuous and related . . . [the following factors are relevant]: the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries." *Liquid Air*, 834 F.2d at 1304; *see Environmental Tectronics v. W. S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1063 (3d Cir. 1988) (stating, "a court should consider a combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity"); *see also Sedima*, 473 U.S. at 496 n.14 (suggesting that courts define "pattern" with the language employed in *Liquid Air*).[5]

---

[5]We also note that some circuits have adopted a literal, and extremely lenient, interpretation of the pattern requirement: two predicate acts in a related endeavor. *See United States v. Ianniello*, 808 F.2d 184, 190 (2d Cir. 1986), *cert. denied sub nom.*, 107 S. Ct. 3229 (1987); *California Architectural Bldg. Products v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988).

We believe that appellants' conduct was of a magnitude sufficient to exhibit a "pattern of racketeering activity." The jury found that each defendant had committed wire and mail fraud (except Krypton which committed only mail fraud)—9 separate acts, each constituting a "racketeering activity." All 19 plaintiffs (excluding spouses) were alleged victims of mail fraud and wire fraud.[6] Two specified individuals, two corporations and Krypton were embroiled in this scheme. The acts occurred over a period of time; the solicitations began in October 1980; the sales occurred between November 1980 and early 1981; the contract envisioned a 10-year relationship between defendants and plaintiffs.[7] We conclude that these acts, even though arguably in furtherance of a single scheme to defraud a class of investors, constituted a sufficient "pattern of racketeering activity."[8]

We also reject any contention that a "pattern" requires "multiple schemes." *See H. J., Inc.*, 829 F.2d at 650; *Int'l Data Bank, Ltd. v. Sepkin*, 812 F.2d 149 (4th Cir. 1987); *United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir. 1986); *cert. denied*, 107 S. Ct. 3229, 3230 (1987); *Bank of Amer. v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986);

---

[6] *See, e.g., Calif. Architectural Bldg. Prods.*, 818 F.2d at 1469 (where defendants made multiple fraudulent sales to multiple victims, activity was a "pattern"); *see also Bank of Amer.*, 782 F.2d at 971 (pattern requirement satisfied when defendants prepared false reports which they knew would be mailed to victims).

[7] *See, e.g., Bank of Amer.*, 782 F.2d at 971 (where acts of wire and mail fraud extended over three years, the pattern requirement was satisfied).

[8] *See, e.g., Barticheck v. Fidelity Union Bank/First Nat. State*, 832 F.2d 36, 38 (3d Cir. 1987) (investment fraud scheme involving misrepresentations to 20 investors was "pattern" of racketeering activity); *United Energy Owners Comm., Inc. v. United Energy Mngmnt.*, 837 F.2d 356 (9th Cir. 1988) (single scheme, involving multiple victims, to defraud through solar energy tax shelter program met pattern requirement).

Sun Sav. & Loan Ass'n v. Dierdorff, 825 F.2d 187 (9th Cir. 1987); *Calif. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469 (9th Cir. 1987); *Bartlicheck v. Fidelity Union Bank/First Nat. State*, 832 F.2d 36, 39 (3d Cir. 1987) (pattern need not involve more than one unlawful scheme). In *Hospital Employees' Divison of Local 79 v. Mercy Memorial Hospital Corp.*, 862 F.2d 606, 608-09 (6th Cir. 1988) and *Hofstetter v. Fletcher*, No. 87-3502, slip op. (6th Cir. Oct. 14, 1988), we have implicitly rejected a multiple scheme requirement.

We find that the scheme was significant enough to constitute a "pattern of racketeering activity," although we concede it is a close question.

D. *Liability of Krypton*

Krypton, in its motion for a directed verdict and j.n.o.v., claimed that it could not be liable because it was not yet incorporated during the existence of the alleged scheme. The district court denied the motions holding Krypton liable as a "de facto" corporation.

RICO allows parties injured by RICO violations to recover from the RICO violators, but only "persons" can violate RICO. 18 U.S.C. § 1962(c) and § 1964(c). "Person" is defined to include "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3).

Under the uncontested circumstances of this case, we hold Krypton to be entitled to a directed verdict. During all times relevant to the RICO violations, Krypton, as an entity, did not have the capacity to hold either legal or beneficial title to property. It follows that Krypton could not violate RICO because it was not a legal "person."

Although a de facto corporation under Ohio law can hold property, under the facts here, a de facto corporation could not have existed. *See* 11 Ohio Jur. 3d, *Business Relationships*

§ 36 (1979) (stating, "a de facto corporation posesses all of the power and authority of a de jure corporation"). In order for a corporation to have de facto status, however, three conditions must be fulfilled: there must be: (1) a general law under which a corporation may lawfully exist; (2) a good faith attempt to organize under the law and a colorable compliance with the statutory requirements; and (3) actual use or exercise of corporate privileges. *Read v. Tidewater Coal Exchange, Inc.*, 116 A. 898 (Del. Ch. 1922); *Society Perun v. Cleveland*, 3 N.E. 357 (Ohio 1885); Henn & Alexander, *Laws of Corporations* § 140 (3d ed. 1983); 11 Ohio Jur. 3d, *Business Relationships* § 40 (1979).

The record makes no indication that there was a good faith attempt to organize or to comply with the statutory requirements. The only evidence in the record was the two letters written on Krypton stationery and Feltner's remark that he thought he told his lawyer to incorporate Krypton. These efforts fall far short of any good faith attempt to incorporate. There is nothing else in the record to indicate that Krypton was any kind of entity capable of holding legal or beneficial title to property.

Whatever Krypton was, it was a part of the enterprise, but it was not a "person" associated with such "enterprise." It cannot, then, be held liable, although individuals who owned and/or operated this entity may have had liability.

III. *DAMAGES*

The defendants vigorously contend that the award of damages cannot stand because plaintiffs paid out, cumulatively, only $211,700 and yet were awarded nearly six times this total in actual damages. Plaintiffs simply assert that damages are not confined to the amount appellees paid in down payments, and that the purpose of the RICO statute is to punish offending defendants. Plaintiffs have failed to set out with particularity the tax adjustments and have offered little proof

to indicate what reasonable return could be expected on their investment (if and when paid for).

Even if we accept the principle that RICO damages are designed to punish, we require plaintiffs in RICO cases to set out a reasonable and principled basis of recovery. The effective means of punishing a defendant in the civil RICO context is to apply the treble multiplier to damages established by competent proof, not based upon mere speculation and surmise.

18 U.S.C. § 1964(c) states that "Any person injured in his business or property by reason of a violation of section 1962 of the chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." We begin our consideration of the damage award with reference to the statutory standard, which, we concede is not very enlightening.

The measure of damages under civil RICO has been described as the harm occasioned as a result of the predicate acts of the offenders. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985). A plaintiff injured by civil RICO violations deserves a "complete recovery." *Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985); *see Liquid Air*, 834 F.2d at 1310. Courts have interpreted this statute to mean that a plaintiff may recover only the "damages flowing directly from the predicate acts." *Volk v. D. A. Davidson & Co.*, 816 F.2d 1406, 1415 (9th Cir. 1987); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984) *aff'd*, 473 U.S. 606 (1985); *DeMent v. Abbott Capital Corp.*, 589 F. Supp. 1378, 1386 (N.D. Ind. 1984). Recovery for physical injury or mental suffering is not allowed under civil RICO because it is not an injury to business or property. *See e.g. Drake v. B. F. Goodrich*, 782 F.2d 638, 644 (6th Cir. 1986).

As a general rule, RICO plaintiffs are entitled only to damages to business or property proximately caused by the predi-

cate acts. *See Haroco,* 473 U.S. at 609. Applying this rule to the circumstances of this case we believe that plaintiffs' damages should be limited to the amounts actually invested. Appellants indicate that plaintiffs collectively paid out to defendants only $211,700; plaintiffs do not challenge these computations.

Plaintiffs contend that the jury intended to award them expectancy or "benefit of the bargain" damages. Although in some cases expectancy damages might be appropriate, clearly they are not in this case. One district court case is especially illustrative of this point. In *Heinhold v. Perlstein,* 651 F. Supp. 1410 (E.D. Pa. 1987), the court dismissed a case because the plaintiff failed to show how defendant's conduct caused him any injury. Plaintiffs similarly have failed here. The conduct of the defendants in the case at bar caused the parties to invest in the films but it did not cause the investment items to become less profitable than defendants represented. As in *Heinhold,* the fraud could not simultaneously induce plaintiffs to invest and reduce the value of the investment's object. There was ample warning about risks involved, particularly tax hazards, therefore, expectancy damages are not recoverable under these circumstances. In addition, there was no realistic evidence presented as to a reasonable value or estimate of lost profits or of the "bargain" based on analogy, experience, or practice.

Plaintiffs also contend that they are entitled to future tax benefits and the penalties associated with the IRS actions against them. Once again, we cannot say that these expenses were caused by the illegal predicate acts. Appellants' fraudulent conduct was confined to representations of the value of the films sold to plaintiffs. Parties remain "free to arrange [their] financial affairs to minimize [their] tax liability," *Stranahan v. Commissioner,* 472 F.2d 867, 869 (6th Cir. 1973), and plaintiffs were not mislead about tax consequences, particularly, Donald Forrester, the C.P.A. The evidence unequivocally indicates that plaintiffs were truthfully

advised of the risks associated with the investment's tax treatment. This case is very different from *Hofstetter v. Fletcher*, No. 87-3502, slip op. (6th Cir. Oct. 14, 1988), in which the fraudulent acts were representations, which defendants knew were false, that plaintiffs could eliminate their federal tax liability by purchasing a life insurance policy in conjunction with the formation of a home-based business and deducting household expenses as business expenses.

During closing argument before the jury, plaintiffs asserted that they were entitled to damages for "everything they had to go through and are still going through" as a result of the alleged wrongdoing. To the extent that this was an invitation for physical injury or mental suffering, it was improper; these damages are not allowed under RICO because they are not injuries to business or property. *Drake v. B. F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1986).

After addressing the extent of plaintiffs' damages, appellants contend that damages should be reduced by the amount of tax benefits plaintiffs received. We disagree. In *Randall v. Loftgaarden*, 478 U.S. 647 (1986), the Supreme Court held, in a securities case, that the rescissory recovery should not be reduced by tax benefits received from a tax shelter investment. The court articulated several reasons for its decision. First, tax benefits are not "income." The securities law at issue stated that the amount of recovery would be consideration paid less income received. *See id.* at 651-52, 658; 15 U.S.C. § 77*l*(2). This factor is not specifically relevant in the RICO context. Second, however, at common law tax benefits were not a direct product of the security. *Randall*, 478 U.S. at 658. And third, the statute seeks rescission plus deterrence, therefore, denying defendants the benefit of offsetting tax benefits generated by their illegal offering is an appropriate result. *See also Freschi v. Grand Coal Venture*, 767 F.2d 1041 (2d Cir. 1985); *vacated*, 106 S. Ct. 3325, *on remand*, 800 F.2d 305, *reconsidered*, 806 F.2d 17 (Supreme Court remanded to determine tax question in light of *Randall* and *Sedima*).

Plaintiffs' award should not be reduced by tax benefits, if any, received.

Finally, the district court also erred in instructing the jury to award damages against each defendant separately and individually. Although there is little direct law on this point, there are numerous RICO criminal forfeiture cases which indicate that the nature of the RICO offense mandates joint and several liability. *See United States v. Caporale*, 806 F.2d 1487, 1506-09 (11th Cir. 1986), *cert. denied*, 482 U.S. 917 (1987); *United States v. Benevento*, 663 F. Supp. 1115, 1118-19 (S.D.N.Y. 1987), 836 F.2d 129 (2d Cir. 1988); *see also Beneficial Standard Life Ins. Co. v. Madarriaga*, 851 F.2d 271, 272 (9th Cir. 1988) (civil RICO liability assessed joint and severally); *cf., Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638-46 (1981) (no right to contribution implied under Sherman or Clayton Act); *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 86-99 (1981) (no right to contribution implied under Equal Pay Act or Title VII); *Miller v. Affiliated Financial Corp.*, 624 F. Supp. 1003, 1004 (N.D. Ill. 1985) (contribution is not available as to RICO liability, relying on *Texas Industries* and *Northwest Airlines*). Defendants all participated in the "enterprise" responsible for the RICO violations; awarding damages separately between each plaintiff and defendant is inconsistent with the nature of the injury appellants inflicted and brings about a danger of multiplying damages before they are trebled.[9]

---

[9]It is an interesting question as to whether the award to Fleischhauer should be reduced by the commissions he received. Upon reflection, we conclude that Fleischhauer may be compensated for the time he spent promoting the program on the theory that loss to his time was damage to his business induced by defendants' conduct.

CONCLUSION

We **AFFIRM** the jury's verdict on all liability issues with the exception of Krypton. We **REVERSE** the judgment as to Krypton. We also **REVERSE** the damages determination; plaintiffs are entitled to damages, assessed jointly and severally against defendants, equal to their investment in the program, in the amount of $211,700. Based on RICO principles, this award will be trebled, the amounts to be allocated based on the schedule attached reflecting the total payments made by each plaintiff.

APPENDIX

Plaintiff/ Transcript Testimony	Purchase Price/ Down Payment Due	Actual Down Payment Made	Tax Audit	Tax Treatment	Damage Awards (without trebling) (R.61) Damages Against C. Elvin Fehner, Jr.	Damages Against Each of Other 4 Defendants (separately)	Total Damages Against All Defendants
1. Natividad Aumentado (Tr. 1096-1097) (stipulation)	$65,000/ $12,500	$6,000	yes	received benefits; after audit $3,578 in interest & penalties paid	$10,048	+ $2,512 x 4	= $20,096
2. Ken W. Chambers (Tr. 921-931)	65,000/ 12,500	5,000	yes	received benefits; audit pending	26,929	+ 6,732 x 4	= 53,857
3. Gordon M. Earle (Tr. 199-253)	350,500/ 68,000	@35,000 (Tr. 233, 240)	yes	received benefits, total tax savings unknown (Tr.241-245, 248); after audit approximately $35,000 owed (Tr.212-215, 240)	43,166	+ 10,792 x 4	= 86,334
4. Harry E. Fleishchhauer (Tr. 628-697) (Tr. 840-869) (Tr. 873-921)	129,800[2] 8,600[3]	200 (Tr.484)	yes	$38,998 in benefits received; after audit $26,000 tax, $25,000 interest, $3,000 penalty paid (Tr. 910, 919-20)	28,378	+ 7,094 x 4	= 56,754
5. Bruce I. Forrester (Tr. 942-989)	65,000/ 10,000 (Tr. 964)	1,500	yes	$50,00 in benefits received; after audit $50,000 in interest & penalties paid[4] (Tr. 965-966)	14,833	+ 3,708 x 4	= 29,665
6. Donald Forrester (Tr. 1048-1052) (Tr. 1064-1095)	162,500/ 2,500	-0-	yes	$97,500 in benefits received; audit pending with potential payment due of $100,000	85,732	+ 21,433 x 4	= 171,464

7. Kathleen D. Forrester (Tr. 989-991)	130,000/ 20,000 (Tr. 964)	3,000	yes	see Bruce Forrester[4]	17,166	+ 4,291 × 4	=	34,330
8. Robert P. Gill (Tr. 1008-1015)	65,000/ 12,500	12,500	no	received benefits; in excess of $12,500 cash net profit (Tr. 1013-1014)	37,742	+ 9,436 × 4	=	75,486
9. Dennis M. Harrington (Tr. 991-998)	65,000/ 12,500	5,000	yes	received benefits; after audit $29,000 tax including $14,000 to $15,000 interest & penalties paid	14,488	+ 3,622 × 4	=	28,976
10. Roger Houston (Tr. 608-628)	130,000/ 25,000	25,000	yes	$42,000 in benefits received, after audit $34,000 taxes, interest & penalties paid	41,878	+ 10,469 × 4	=	83,754
11. Charles E. Judd dba C. B. Judd & Associates (Tr. 1098-1098) (stipulation)	65,000/ 10,000	5,000	no	received benefits	26,929	+ 6,732 × 4	=	53,857
12. C. T. Lee (Tr. 1099-1100) (stipulation)	65,000/ 12,500	12,500	yes	received benefits; after audit benefits disallowed	32,239	+ 8,060 × 4	=	64,479
13. Robert & Ona Louise Mournighan (Tr. 490-508) (Tr. 512-547)	97,450[2] / 18,750	6,000 (Tr. 523)	no	$20,000 in federal tax benefits received (Tr. 537)	28,394	+ 7,098 × 4	=	56,786

14.	Charles Mueller (Tr. 931-942)	65,000/ 12,500	6,000	yes	received benefits, after audit $32,000 taxes, interest + penalties paid	24,259	+ 6,065 x 4	= 48,519
15.	James Ralph (Tr 547-585)	65,000/ 12,500	12,500	yes	$24,000 in benefits received; after audit $24,000 tax, $19,200 interest, $1,000 penalty paid (Tr. 583-584)	39,904	+ 9,226 x 4	= 76,808
16.	REF Productions Ltd. (Tr. 1015-1048)	260,000/ 50,000	35,000[5]	yes	received benefits; after audit $151,000 tax and $58,000 in interest + penalties paid to IRS & $13,662 KY tax[6]	82,747	+ 20,687 x4	= 165,495
17.	Joseph Ressinger (Tr. 585-608)	65,000/ 12,500	12,500	no	$15,000 in benefits received (in excess of payments) (Tr. 607)	36,904	+ 9,226 x 4	= 73,808
18.	Louis B. Updegrove (Tr. 1052-1064)	45,500/ 8,750	4,000	no	received benefits in excess of $4,000	25,516	+ 6,379 x 4	= 51,032
19.	Daniel E. & Carol Ann Wright (Tr. 998-1008) (Tr. 253-319)	130,000/ 25,000	25,000	yes	received benefits, after audit $46,000 paid to IRS of which $18,000 was interest (Tr. 293)	42,809	+ 10,702 x 4	= 85,617
TOTALS		$2,085,750/ $346,600	$211,700	14 yes/no		$660,061	+ $164,264 x 4	=$1,317,117

FOOTNOTES:

1. Received commissions on all sales to plaintiffs and others in the amount of $55,858 (JTX-62) (Tr. 1288)
2. Stipulation (Tr. 51)
3. Balance of $8200 to be paid through offset on commissions due (JTX-115)
4. Joint return filed in 1980 for Bruce Forrester and Kathleen Forrester per the former (Tr. 964-965), and separate return per the latter (Tr. 911)
5. Paid $25,000 by Charles Eppling and $10,000 by George Renker (nothing paid by REF or Donald Forrester) (Tr. 1036)
6. No tax paid by REF or by Donald Forrester as general partner, Charles Eppling paid $106,668 and George Renker paid $113,114 to IRS

SUPPLEMENTAL OPINION

Issued August 31, 1989

In our original opinion in this case, we affirmed the jury's verdict on liability issues, with the exception of Krypton Corporation's liability which we reversed, and we reversed the damages determination finding that the evidence could not support the amount of damages the jury awarded. We held that in civil actions under the Racketeer Influenced Corrupt Organizations Act, a successful plaintiff is "entitled to damages to business or property proximately caused by the predicate acts," assessed jointly and severally. Under the evidence introduced at that trial, we concluded that the plaintiffs were entitled, for the most part, to recover the "amounts actually invested," subject to trebling. To assist the district court in modifying its judgment on remand, we attached to the opinion, as an Appendix, a chart summarizing the evidence presented relating to these amounts.

Appellees filed a motion for rehearing on July 11, 1989, to which this court requested a response from appellants. A response was filed on July 28, 1989. Appellees asked the panel to reconsider some of the Appendix entries in light of information in the transcript not previously brought to the attention of the panel. Appellants conceded several of appellees' objections in their response.

In light of appellants' concessions and our evaluation of the other points raised in appellees' motion to reconsider, we amend the Appendix of the opinion to reflect the following payments several of the appellees made to Southwest Capital Corporation. The following appellees should be credited with having paid the amounts in parentheses following their names in addition to the amounts reflected in the Appendix: Bruce I. Forrester ($254); Dennis M. Harrington ($630); Roger Houston ($1,416); Charles Muel-

ler ($600); Daniel E. & Carol Ann Wright ($410); and Joseph Reisinger ($210).

Appellees also contest the amount of down payments made by Bruce I. Forrester and Kathleen D. Forrester. The precise amounts of their down payments should be determined by the district court on remand.

In all other respects the Court's opinion is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-84-0872

Harry Fleischhauer, *Et al.*,

Plaintiffs,

v.

Elvin Feltner, Jr., *Et al.*,

Defendants.

ORDER

This matter is before the Court upon consideration of the jury award attached hereto as Chart A. In accordance therewith and in accordance with 18 U.S.C. § 1964 the Court does order that each of such damages award be and it is hereby tripled resulting in an award of damages as attached in Chart B.

In addition to the foregoing, Plaintiffs are hereby awarded their costs and a reasonable attorney fee. Plaintiffs' counsel is directed to submit to the Court within thirty (30) days of the date of this Order a statement setting forth in detail the legal services rendered and the appropriate costs therefor.

IT IS SO ORDERED.

/s/ Carl B. Rubin
Carl B. Rubin, Chief Judge
United States District Court

Fleischhauer -v- Feltner

C-1-84-0872

FILED
KENNETH J. MURPHY, CLERK JUL 29 3:57 PM '87
U.S. DISTRICT COURT SOUTHERN DISTRICT OF OHIO WEST DIV. CINCINNATI

CHART A
RICO DAMAGES

	C. Elvin Feltner, Jr.	Robert J. Levine	Palm Beach Properties, Inc aka Palm Beach Films Inc	Metropolitan Properties, Inc aka Metropolitan Films Inc	Krypton Corporation
Harry E. Fleischhauer	$28,378.00	$ 7,094.00	$ 7,094.00	$ 7,094.00	$ 7,094.00
Louis B. Updegrove	$25,516.00	$ 6,379.00	$ 6,379.00	$ 6,379.00	$ 6,379.00
Roger Houston	$41,878.00	$10,469.00	$10,469.00	$10,469.00	$10,469.00
Bruce I. Forrester	$14,833.00	$ 3,708.00	$ 3,708.00	$ 3,708.00	$ 3,708.00
Kathleen D. Forrester	$17,166.00	$ 4,291.00	$ 4,291.00	$ 4,291.00	$ 4,291.00
Robert P. Gill	$37,742.00	$ 9,436.00	$ 9,436.00	$ 9,436.00	$ 9,436.00
Daniel E. & Carol Ann Wright	$42,809.00	$10,702.00	$10,702.00	$10,702.00	$10,702.00
Gordon M. Earle	$43,166.00	$10,792.00	$10,792.00	$10,792.00	$10,792.00
REF Productions Ltd.	$82,747.00	$20,687.00	$20,687.00	$20,687.00	$20,687.00
Dennis M. Harrington	$14,488.00	$ 3,622.00	$ 3,622.00	$ 3,622.00	$ 3,622.00
Charles Mueller	$24,259.00	$ 6,065.00	$ 6,065.00	$ 6,065.00	$ 6,065.00
C. T. Lee	$32,239.00	$ 8,060.00	$ 8,060.00	$ 8,060.00	$ 8,060.00
James Ralph	$39,904.00	$ 9,226.00	$ 9,226.00	$ 9,226.00	$ 9,226.00
Natividad Aumentado	$10,048.00	$ 2,512.00	$ 2,512.00	$ 2,512.00	$ 2,512.00
Donald Forrester	$85,732.00	$21,433.00	$21,433.00	$21,433.00	$21,433.00
Robert & Ona Louise Mournighan	$28,394.00	$ 7,098.00	$ 7,098.00	$ 7,098.00	$ 7,098.00
Joseph Reisinger	$36,904.00	$ 9,226.00	$ 9,226.00	$ 9,226.00	$ 9,226.00
Ken W. Chambers	$26,929.00	$ 6,732.00	$ 6,732.00	$ 6,732.00	$ 6,732.00
Charles E. Judd d.b.a. C.E. Judd & Associates	$26,929.00	$ 6,732.00	$ 6,732.00	$ 6,732.00	$ 6,732.00

7-28-87
Date

/s/ Mark Wiggenham
Foreman

CHART B
TREBLED DAMAGES

	C. Elvin Feltner, Jr.	Robert J. Levine	Palm Beach Properties, Inc aka Palm Beach Films Inc	Metropolitan Properties, Inc aka Metropolitan Films Inc	Krypton Corporation
Harry E. Fleischhauer	$ 85,134	$21,282	$21,282	$21,282	$21,282
Louis B. Updegrove	$ 76,548	$19,137	$19,137	$19,137	$19,137
Roger Houston	$125,634	$31,407	$31,407	$31,407	$31,407
Bruce I. Forrester	$ 44,499	$11,124	$11,124	$11,124	$11,124
Kathleen D. Forrester	$ 51,498	$12,873	$12,873	$12,873	$12,873
Robert P. Gill	$113,226	$28,308	$28,308	$28,308	$28,308
Daniel E. & Carol Ann Wright	$128,427	$32,106	$32,106	$32,106	$32,106
Gordon M. Earle	$129,498	$32,376	$32,376	$32,376	$32,376
REF Productions Ltd.	$248,241	$62,061	$62,061	$62,061	$62,061
Dennis M. Harrington	$ 43,464	$10,866	$10,866	$10,866	$10,866
Charles Mueller	$ 72,777	$18,195	$18,195	$18,195	$18,195
C. T. Lee	$ 96,717	$24,180	$24,180	$24,180	$24,180
James Ralph	$119,712	$27,678	$27,678	$27,678	$27,678
Natividad Aumentado	$ 30,144	$ 7,536	$ 7,536	$ 7,536	$ 7,536
Donald Forrester	$257,196	$64,299	$64,299	$64,299	$64,299
Robert & Ona Louise Mournighan	$ 85,182	$21,294	$21,294	$21,294	$21,294
Joseph Reisinger	$110,712	$27,678	$27,678	$27,678	$27,678
Ken W. Chambers	$ 80,787	$20,196	$20,196	$20,196	$20,196
Charles E. Judd d.b.a. C.E. Judd & Associates	$ 80,787	$20,196	$20,196	$20,196	$20,196

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASE NUMBER: C-1-84-0872

HARRY FLEISCHHAUER *ET AL.*
v.
ELVIN FELTNER, JR. *ET AL.*

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

■ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED **that the jury award be TRIPLED. Further ORDERED that plaintiffs are AWARDED their costs and reasonable attorney fees. Plaintiff's counsel is DIRECTED to submit to the Court within 30 days a statement seting forth in detail the legal services rendered and appropriate costs.**

August 13, 1987
Date

Kenneth J. Murphy, Clerk
Clerk
/s/ Paul Hennessy
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-84-0872

Harry Fleischhauer, *Et al.*,

Plaintiffs,

v.

Elvin Feltner, Jr., *Et al.*,

Defendants.

FILED
KENNETH J. MURPHY
CLERK
OCT 29 1:47 PM '87
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIV. CINCINNATI

ORDER

This matter is before the Court on a motion for a directed verdict, judgment not withstanding the verdict and for new trial by defendant C. Elvin Feltner, Jr., Robert J. Levine, Palm Beach Properties, Inc., (also know as Palm Beach Films, Inc.), Metropolitan Properties, Inc., (also known as Metropolitan Films, Inc.), and Krypton Properties, Inc. (doc. 65) and upon Krypton Corporation's motion for directed verdict and/or judgment notwithstanding the verdict and in the alternative for a new trial (doc. 67). Plaintiff responded to such motions by document 71 and defendants have replied by documents 72 and 73. Upon

consideration of the foregoing motions, the Court determines that defendants were accorded a fair trial and that the jury was properly instructed as to the applicable law. The determination by the jury was consistent with the evidence presented and with the instructions of the Court. Accordingly, such motions are hereby DENIED.

Plaintiffs' counsel has submitted a statement for services in accordance with the judgment entered August 13, 1987. Such statement, however, does not comply with the requirements of this Court and must be resubmitted pursuant to Section III of the "Instructions for Trial Preparation in the Court of Carl B. Rubin, Chief Judge".

Plaintiffs' counsel have presented a chronological statement which is incapable of review by this Court. Plaintiffs' counsel are hereby granted thirty days within which to refile such request in accordance with this Court's Instructions.

IT IS SO ORDERED.

/s/ Carl B. Rubin
Carl B. Rubin, Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-4060

HARRY E. FLEISCHHAUER, *et al.*,
Plaintiffs-Appellees,

v.

C. ELVIN FELTNER, JR., *et al.*,
Defendants-Appellants.

FILED

JUN 27 1989

LEONARD GREEN, Clerk

Before: KRUPANSKY and WELLFORD, Circuit Judges; and JOINER, Senior District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed in part and reversed in part.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/ Leonard Green
Clerk

Issued as Mandate: September 25, 1989 A True Copy.

COSTS	None	Attest:
Filing fee	$	/s/ Gary McCarthy
Printing	$	Deputy Clerk
Total	$	

18 U.S.C. §1961. Definitions

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to engaging in monetary transactions in property derived from specified unlawful activity), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to white slave traffic), (C) any

act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States; or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because

of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. §1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern

of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity, or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. §1964 Civil Remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.